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In The
Supreme Court of the United States

ANDREW POLICASTRO,
Petitioner,

v.

DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

ANDREW POLICASTRO
59 DAY AVENUE
TENAFLY, NJ 07670
(201) 568-0387

Petitioner Pro Se

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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DISRUPTION

"There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum." (Judge Pisano, Tr. 160:9).

Tenafly's brief (p. 13) fleetingly mentions the heart of their defense: the so called "disruption", "...the disruption with the teachers and the school's operation that morning." Since the memo of this case does not reach the high *Tinker* standard of "material and substantial disruption" the Third Circuit has overturned *Tinker*.

The trial transcript, common sense and the memo itself reveal what any fact finder would find: there was no "material and substantial disruption." While Tenafly's brief claims "disruption"; *Tinker* requires "material and substantial disruption." The Third Circuit's 2008 opinion egregiously ignored *Tinker* in spite of the fact that *Tinker* was the basis of my legal victory in 2005.

"...[T]eachers were out of their classrooms discussing the contents of the memo in the hallways, in the library...". (Judge Pisano's ruling, Tr. 204:11). Two secretaries in the library were talking about the memo and a student had to wait a minute for assistance. This "material and substantial disruption" claimed by Tenafly defies logic. Tenafly's case crumbles.

In Tenafly High School teachers routinely spend half of the day out of the classroom because of our normal teaching schedule. The image of teachers in

their classrooms all day is correct only for elementary schools.

Therefore, Judge Pisano's ruling is baseless because it claims teachers discussing the memo left classrooms unattended, and that absolutely did not happen. During Oral Argument before the Third Circuit Tenafly's counsel admitted there was not any evidence of teachers leaving their classrooms with students inside.

From the Third Circuit Oral Argument (1-23-07):

> 20 minutes: 38 seconds-
> Tenafly: "We submit that teachers outside their classrooms. That is a disruption." (How so? Most high school teachers are assigned classrooms 50 percent of the day. This is completely normal and not at all disruptive.)
>
> 20 minutes: 55 seconds-
> Judge Fuentes: "Was there any evidence that any of the teachers left classrooms with students inside unattended?"
>
> Tenafly: "There was none on the record or testimony to that. None at all."

In light of this exchange between Circuit Judge Fuentes and Tenafly's counsel Judge Pisano's ruling that "[T]eachers were out of their classrooms discussing the contents of the memo in the hallways" is in error. In no instance were students left unattended. From the trial: Kontogiannis (Principal): "...I heard from many people within an hour that they

were either offended by it or they were outside the classrooms discussing this. I can't prove it, that was just told to me, okay". (Tr. 138:22).

I questioned the principal about teachers leaving their students during class instruction (Tr. 141-142) and she stated, "I was told that, yes. I can't prove that, that's what I was told." (Tr. 142:2). I then asked, "What discipline, if any, occurred to the teachers who left their students unattended to complain about the memo?" (Tr. 142:4). The principal testified, "I did not follow-up on that." (Tr. 142:9). I pressed this issue because teachers leaving their classes during instructional time is conduct unbecoming. The principal testified she did not follow up on conduct unbecoming (teachers leaving students unattended), but she did follow up that two teachers were offended by the "plain vanilla" memo in the mailbox that asked five questions, including, "(5) What was the negotiating team's original proposal to the Board?" App. 51a. There was no disruption at all, and there unequivocally was no "material and substantial disruption."

The principal's interrogatories (August 25, 2005- over 4 months before the trial) confirm that students were not left unattended:

> 10. What discipline, if any, occurred to the teachers who left their students unattended to complain about the memo?
>
> Response: ...Defendant answers that she is unaware of any teacher having left students unattended and, therefore, no one was disciplined.

(I submitted the principal's interrogatories as exhibits 127-132 in District Court and as appendix A-15 to A-20 before the Third Circuit).

Dr. Kontogiannis stated, "There's nothing in this memo that I find inappropriate." (Tr. 139:5). The memo was removed, then, because a few teachers did not agree with the memo.

How could the "plain vanilla" memo cause a "material and substantial disruption"? It could not and did not. As a matter of law the memo did not reach the high *Tinker* standard. Two teachers complained to the principal about the memo? These same two teachers testified that they never complained; they only discussed the memo with the principal. (Tr. 56-59; 88-92). Two secretaries in the library were chatting about the memo while a student had to wait a minute to take out a book? Is that what it takes to reach the *Tinker* standard in the Third Circuit?

The principal's interrogatories listed many teachers who supposedly complained to her about the memo. However, in blatant contradiction, teachers listed (interrogatories) as complainers testified that they never complained to the principal about the memo. (Tr. 58:4; 84:5; 89:17; 106:22-107:9).

Saxe at 212, "Noting that the only evidence was the objection of several other students[teachers], the court observed that "[I]f school officials were permitted to prohibit expression to which other students[teachers] objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression." *Saxe v. State College*, 240 F.3d 200,

(Justice Alito, 3rd Cir. 2001). This is exactly what happened in this case!

Tenafly's brief (p. 2), "A maelstrom of discontent ensued..." and "the high school became engulfed in controversy..." This is pure fiction. Where is Tenafly's evidence to back up this hyperbole? "...[T]he exact reaction the signers of the document intended..." is an especially offensive misstatement and clear speculation without any substantiation in the record. The record reveals quite the opposite on direct examination by me of the teacher who placed the memo in the mailboxes twice that morning:

> Q. "Mr. Golde, why did you place the memos in the teacher mailboxes?"
>
> A. "Because I was among 13 people, I believe, who signed this, who felt that there were important issues that the negotiation team needed to address and that all staff members would want to hear the response of the negotiation team to those issues." (Tr. 36:21).

Tenafly's brief (p.3), "...the memo...was disrupting the normal academic flow in the library and elsewhere while students waited to be accommodated by the teaching staff." The library is not a classroom; there is no normal academic flow. It is a library and two secretaries were chatting about the memo. So what? What if they were talking about the weather? "[E]lsewhere? What does elsewhere mean? Where is the evidence? Tenafly is required to reference these facts and they did not because they cannot. "[T]eaching staff? What teaching staff? The trial revealed one

student waited a minute for assistance in the library from the secretaries. Significantly, the trial testimony revealed the library is completely closed all day many times a year for events and meetings. (Tr. 169:11). "But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students[secretaries, teachers]." *Bd. of Ed., Island Trees Union Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982).

"The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school." *Id.*" *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986).

This is the *Tinker* test and it was affirmed by this Court in 1986. Let us examine "the expression or its method of exercise" logically: if A or B then C.

A = The expression materially and substantially interferes with the activities or discipline of the school.
B = The method of exercise materially and substantially interferes with the activities or discipline of the school.
C = Teacher communications may be suppressed.

The expression (A) was the memo; the method of exercise (B) was placing the memos in the teacher

mailboxes. Because there could not be a milder method of exercise (B) in a high school than a teacher placing memos in teacher mailboxes we only have to consider A.

The first Third Circuit panel (Jan. 2005) opined, "The memo contained five questions regarding the negotiation of the Tenafly teachers' contract...The Memo does not contain lewd or vulgar statements". App. 36a.

The District Court stated, "There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum." (Tr. 160:9). The court also described the memo as "plain vanilla" during the bench ruling. (Tr. 209:12), App. 27a.

The principal stated,

> (1) "...I don't think there's anything in here[the memo] that is obscene or vulgar..." (Tr. 135:23);
> (2) "I don't see anything in here[the memo] personally that I'm offended by..." (Tr. 136:5);
> (3) "There's nothing in this memo that I find inappropriate." (Tr. 139:5).

The recent Third Circuit panel (Jan. 2008) used "plain vanilla". App. 2a.

Taking all of these statements as true, to paraphrase:

> the expression (A) of this case was reasonable and appropriate and not lewd, not vulgar and

not offensive. The expression (A) was "plain vanilla".

Reasonable, appropriate and "plain vanilla" expression (A) cannot materially and substantially interfere with the activities or discipline of the school.

Conclusion: Under the *Tinker* test the memo may not be suppressed.

This analysis was affirmed by the Supreme Court in 1986. The first Third Circuit panel (2005) agreed and concluded, "Thus, the speech would fall under the *Tinker* rule, whereby Tenafly can only regulate the speech if it would "substantially disrupt school operations or interfere with the right of others." *Saxe,* 240 F.3d at 214." App. 37a.

Tenafly argued in District Court and on appeal that the memo caused disruption; while any real analysis under *Tinker* reveals otherwise. Teacher free speech and the First Amendment have been obliterated!

The Third Circuit's recent opinion egregiously stated, "...arguments among teachers." App. 2a. What arguments? Where did this come from? There were no arguments among teachers mentioned in any brief, any transcript or any prior opinion! I have listened to the oral argument of this case over 5x and there is absolutely no mention of teacher arguments. Where on Earth did this statement come from? The statement, "...arguments among teachers" is fiction. There never was a "material and substantial disruption" and now the Third Circuit is imagining facts that never existed!

I discussed "arguments among teachers" in my petition (p. 35). Besides the compliments Prof. Gressman gave to me on page 59a in my petition, his book emphasizes, "The opposition must identify any misstatement of fact or law in the petition or risk waiver". *Supreme Court Practice*, Gressman et al., p. 495, (2007). Gressman reinforces Supreme Court rule 15.2., "...the brief in opposition should address any perceived misstatement of fact or law in the petition...". *Id.* at 496. Tenafly could not and did not refute that there were never "arguments among teachers". Tenafly loses credibility by not admitting the fiction of "arguments among teachers." Tenafly's credibility implodes regarding mootness, as well.

MOOTNESS

Tenafly's brief (p. 5), "...holding that since damages were not sought, the issue was moot". Tenafly clearly acknowledged and witnessed in District Court that I absolutely and unequivocally asked for damages. This case is not about money; I asked for damages only so the case would proceed. I replied to the mootness theory. (Petition 34-35, App. 53a-56a). Let me respond, contrary to Tenafly's brief, with facts and actual references.

1. My April 27, 2005 email to Tenafly's counsel stated, "Would you please reply back to this email if accepting that I have complied with your "Demand for Statement of Damages." Besides all demands asked for in my original complaint, demands 11-15, I ask for $10,000,000 (Ten million dollars) as the amount of damages claimed in this action." App. 53a-54a.

Tenafly's counsel April 28, 2005 reply email stated, "I acknowledge receipt of your statement of damages and will accept same as compliance with local rule 8.1." App. 53a.

I never coveted money via this lawsuit; that was true in 2005 and it is still true today. This lawsuit is not about money, this case is about the First Amendment rights of teachers. This case is *Tinker* for teachers, plain and simple.

2. District Court on June 30, 2005, "Is there any claim for damages here? Are you making any claim for monetary damages? What is the relief you seek?" I replied, "In the complaint I have none. Tenafly responded with, I forget what the letter said, and I asked for ten million back for my--" "You asked for what?" "Ten million." "$10 million?" "I asked for that so the lawsuit wouldn't stop." "Is that in the complaint?" "No, I'm asking for nothing in the complaint." "All you want is injunctive relief?" "That's correct." App. 55a-56a.

As a pro se plaintiff I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1 the lawsuit would be over. That is why I asked for Ten million. App. 55a-56a.

3. Settlement hearing, August 1, 2005 (p. 5:13, in chambers and on the record):

> THE COURT: "That being said, I asked you a question, Mr. Policastro, after we argued the motion for summary judgment, which is what your

damages are. And you made a demand, as I recall it, of some millions of dollars to settle the case. I'd like you to articulate some rational basis, in fact, for that sort of a demand in this case."

MR. POLICASTRO: "That was the Rule 8(1) -- I forget what the rules are."

THE COURT: "Why don't you put the rules aside. You're not a lawyer, I'm not going to hold you to rules. Your pleadings will be given a more liberal treatment because you're not a lawyer."

How ironic! Judge Pisano in August, 2005 stating, "I'm not going to hold you to rules." While the Third Circuit certainly tried! This case is not moot and has never been moot. This case is not about money, I only asked for money to keep the case from ending. $1 in nominal damages is fine with me. Judge Pisano could have easily converted the $10,000,000 to $1 in nominal damages; it would have been OK with me. It was plain error for the Third Circuit to rule my pro se case was moot in January, 2008. It was actually egregious error by the Third Circuit because the mootness claim was never briefed by either party before the Third Circuit and mootness was never discussed at Oral Argument in January, 2007.

Tenafly's brief (p. 1), "Given that Petitioner waived any claim for damages the Third Circuit correctly held that his First Amendment free speech claim was moot." This is an egregious misstatement by Tenafly. I never waived any claim for damages. I never waived any claim for damages in District Court or in my 7 minutes (Oral Argument) before the Third Circuit.

OVERBREADTH

Tenafly's brief (p. 8), states I am conflated about overbreadth. I handled the overbreadth issue squarely in my petition (p. 34). The Tenafly teacher mailbox policy is unconstitutional if teacher mailboxes are constitutionally protected. *Perry* is clear that teacher mailboxes are constitutionally protected: "The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra...*" *Perry Ed. Assoc. v. Perry Local Ed. Assoc.*, 460 U.S. 37, 44 (1983). Thus, the Tenafly teacher (prior approval) mailbox policy is unconstitutional. From *Perry* at 44, quoting *Tinker* at 506, "There is no question that constitutional interests are implicated by denying PLEA[Policastro's memo] use of the interschool mail system[teacher mailboxes]. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"."

> A statute[teacher mailbox policy] may withstand an overbreadth attack "only if as authoritatively construed..., it is not susceptible of application to speech...that is protected by the First and Fourteenth Amendments." *Goodling v. Wilson*, 405 U.S. 518, 520 (1972). If the ordinance[teacher mailbox policy] applies to appellant's activities[use of teacher mailboxes] and if appellant's activities[use of teacher mailboxes] are constitutionally protected, then the ordinance[teacher mailbox policy] is overly broad, and thus, unconstitutional. *Grayned v. City of Rockford,* 408 U.S. 104, 124 (1972).

Thus, the Tenafly mailbox policy is unconstitutional.

FROZEN SPEECH

Tenafly's brief (p. 10), "Thus, Petitioner can hardly argue that the policy or actions of Dr. Kontogiannis "chilled" his First Amendment rights to free speech". My speech is not merely chilled at Tenafly, it is frozen. Two months after the memos were removed I had a meeting with the principal about what happened. At "[t]he end of the meeting, Dr. K reinforced that prior approval must be had before placing items in the teacher mailboxes." (Tr. 184:16). Tenafly's brief (p. 4) and the Third Circuit misinterpreted, "use of the mailboxes...has continued as usual". Other teachers' use of the mailboxes has continued as usual, but not my use. During the meeting (May, 2002) the principal gave me a verbal directive, witnessed by two staff members, "that prior approval must be had". The principal's removal of the memo (March, 2002), her verbal directive (May, 2002), and subsequent court decisions of my case (2004, 2006, 2008) have absolutely chilled my Constitutional right to free speech in the teacher mailboxes.

Considering Tenafly's recent major disciplinary action against me suspending my use of school email (teacher free speech), based on the school mailbox/school email policy, my speech is now effectively frozen. (Petition 2-3, App. 61a-69a).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. Expedited briefing is requested.

Respectfully submitted,

Andrew Policastro
Pro Se
59 Day Avenue
Tenafly, NJ 07670
(201) 568-0387